

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 18, 2006 Session

**STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES
v. D.L.M.L.**

**Appeal from the Juvenile Court for Hamilton County
Nos. 199,797, 199,798, and 199,799 Suzanne Bailey, Judge**

No. E2005-02194-COA-R3-PT - FILED APRIL 24, 2006

In May of 2005, the State of Tennessee, Department of Children's Services ("DCS") filed a petition seeking to terminate the parental rights of D.L.M.L. ("Mother") to her three minor children. After Mother failed to respond timely to the petition, the Juvenile Court Referee granted DCS's motion for a default judgment. At the hearing where the default motion was granted, no proof was offered concerning whether grounds for terminating Mother's parental rights existed or whether terminating Mother's parental rights was in the children's best interests. Following the hearing, the Referee entered an order terminating Mother's parental rights. The Juvenile Court Judge subsequently adopted and confirmed the order of the Referee. Because the complete lack of proof in the record prevents this Court's effective review of the propriety of the Juvenile Court's judgment, the judgment of the Juvenile Court terminating Mother's parental rights is vacated and this case is remanded for further proceedings consistent with this Opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Juvenile Court Vacated; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Cara C. Welsh, Chattanooga, Tennessee, for the Appellant D.L.M.L.

Paul G. Summers, Attorney General and Reporter, Amy T. Master, Assistant Attorney General, Nashville, Tennessee, for the Appellee State of Tennessee, Department of Children's Services.

OPINION

Background

In May of 2005, DCS filed a Petition to Terminate Parental Rights. In this petition, DCS sought to terminate Mother's parental rights to R.A.L., B.R.L., and B.L.M., who are ages 3, 4, and 14, respectively. As grounds for terminating Mother's parental rights, DCS claimed Mother had abandoned the children by willfully failing to visit or by engaging in only token visitation for a period of four consecutive months immediately preceding the filing of the petition. DCS also alleged Mother willfully failed to support the children for a period of four consecutive months immediately preceding the filing of the petition. DCS alleged various other grounds under which it sought to terminate Mother's parental rights. DCS also alleged that it was in the children's best interests for Mother's parental rights to be terminated.

When Mother failed to respond to the petition, DCS filed a motion for default judgment. A hearing was conducted on July 20, 2005, whereupon the Juvenile Court Referee simply granted DCS's motion for default judgment. No proof was presented at the hearing and the transcript from that hearing is a grand total of three pages.

Following the hearing, the Referee entered an order terminating Mother's parental rights. The order stated that because Mother failed to appear at the hearing, the allegations contained within the complaint would be taken as confessed. The Referee's order terminating Mother's parental rights was adopted and confirmed by the Juvenile Court on October 14, 2005, and Mother appeals. Prior to the Referee's order being confirmed, the Referee determined that Mother was indigent, allowed her to proceed upon a pauper's oath, and appointed counsel to represent her.

Discussion

The factual findings of the Juvenile Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). In *In re Adoption of T.A.M.*, No. M2003-02247-COA-R3-PT, 2004 WL 1085228 (Tenn. Ct. App. May 12, 2004), *no appl. perm. appeal filed*, this Court observed that:

Because of the heightened burden of proof required by Tenn. Code Ann. § 36-1-113(c), we must adapt Tenn. R. App. P. 13(d)'s customary standard of review for cases of this sort. First, we must review the trial court's specific findings of fact *de novo* in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence

preponderates otherwise. Second, we must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights. *Jones v. Garrett*, 92 S.W.3d at 838; *In re Valentine*, 79 S.W.3d at 546; *Ray v. Ray*, 83 S.W.3d at 733; *In re L.S.W.*, No. M2000-01935-COA-R3-JV, 2001 WL 1013079, at *5 (Tenn. Ct. App. Sept. 6, 2001), *perm. app. denied* (Tenn. Dec. 27, 2001).

In re Adoption of T.A.M., 2004 WL 1085228, at *3 (footnote omitted).

In *Dep't of Children's Servs. v. D.G.S.L.*, this Court discussed the relevant burden of proof in cases involving termination of parental rights. Specifically, we observed:

It is well established that "parents have a fundamental right to the care, custody, and control of their children." *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). "However, this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)).

Termination of parental or guardianship rights must be based upon a finding by the court that: (1) the grounds for termination of parental or guardianship rights have been established by clear and convincing evidence; and (2) termination of the parent's or guardian's rights is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c). Before a parent's rights can be terminated, it must be shown that the parent is unfit or substantial harm to the child will result if parental rights are not terminated. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Similarly, before the court may inquire as to whether termination of parental rights is in the best interests of the child, the court must first determine that the grounds for termination have been established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)....

Dep't of Children's Servs. v. D.G.S.L., No. E2001-00742-COA-R3-JV, 2001 WL 1660838, at *6 (Tenn. Ct. App. Dec. 28, 2001), *no appl. perm. appeal filed*.

In light of the fact that the record contains absolutely no evidence, we are completely unable to perform any sort of a review to determine if there actually was sufficient proof to conclude

that grounds for terminating Mother's parental rights had been established by clear and convincing evidence. Likewise, we cannot determine if there is sufficient proof to conclude that there was clear and convincing evidence that termination of Mother's parental rights was in the best interests of the children. In cases such as this case when a parent does not respond to a petition to terminate parental rights and a default judgment is sought, a trial court nevertheless must hear testimony and otherwise conduct a hearing where sufficient evidence is offered for the trial court to determine if grounds for terminating the parental rights have been proven by clear and convincing evidence, and whether it has been proven by clear and convincing evidence that terminating the parental rights was in the best interests of the children. Without being able to evaluate this critical but absent evidence, we have no choice but to vacate the judgment of the Juvenile Court. In its brief on appeal, DCS candidly acknowledges the fatal deficiencies in the record and that the judgment must, therefore, be vacated.

Finally, if Mother remains indigent on remand, then we direct the Referee and/or the Juvenile Court to the following holding from *In re: Adoption of J.D.W.*, No. M2000-00151-COA-R3-CV, 2000 WL 1156628 (Tenn. Ct. App. Aug. 16, 2000), *no appl. perm. appeal filed*:

[W]e hold that, in cases involving the termination of parental rights, a record of the proceeding of sufficient completeness to permit proper appellate consideration of the parent's claims must be made in order to preserve that parent's right to an effective appeal. If the parent whose rights are to be terminated is indigent, then the trial court must ensure that such a record is created and made available to a parent who seeks to appeal. Because the trial record does not constitute a record of sufficient completeness for appellate review, we vacate the orders terminating the father's parental rights and granting the subsequent adoption and remand this case to the trial court for a new trial on this matter. The trial court shall determine the father's indigency, and if the father is indigent, the trial court shall ensure the availability of a record of trial evidence and events which is sufficiently complete to allow an appellate court to review the evidence in accordance with applicable standards.

J.D.W., 2000 WL 1156628, at * 4 (footnote omitted).

Conclusion

The judgment of the Juvenile Court terminating Mother's parental rights is vacated, and this case is remanded to the Juvenile Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed to the Appellee, State of Tennessee, Department of Children's Services.

D. MICHAEL SWINEY, JUDGE